93-885

No.

Supreme Court, U.S.
FILED
DEC - 6 1993
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

RICHARD ALVAREZ,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ANDREW PARNES
Counsel of Record
160 Second Street East
Ketchum, Idaho 83340
Telephone: (208) 726-1010
Counsel for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

QUESTIONS PRESENTED

1. Whether the version of 18 U.S.C. §215(a) [the receipt of a gift for a loan] which does not include a specific intent mens rea is constitutionally vague and overbroad.

2. Whether the language "except as provided by law" in 18 U.S.C. §215(a) is an essential element of the offense such that the prosecution has the burden of proving this element beyond a reasonable doubt.

3. Whether the failure to instruct the jury that the defendant himself was required to know that gift was related to the loan was error.

4. Whether the failure to limit the charged offenses to a time after the enactment of the statute which criminalized the alleged acts violated the Ex Post Facto Clause of the United States Constitution.

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The petitioner, Richard Alvarez, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 30, 1993. A petition for rehearing was denied by the Ninth Circuit on October 28, 1993.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals [which is unreported] appears in the **Appendix "A"** hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 30, 1993. A petition for rehearing was timely filed and the petition for rehearing was denied on October 28, 1993. (A copy of the order denying the petition for rehearing appears in the **Appendix "B"** hereto.) This petition for certiorari

is filed within ninety days of the October 28, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, art I, § 9, cl. 3: No bill of attainder or ex post facto law shall be passed.

18 U.S.C. § 215(a): Whoever, being an officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, except as provided by law, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value, for himself or for any other person or entity, other than such financial institution, from any person or entity for or in connection with any transaction or business of such financial institution . . . shall be fined . . . or imprisoned not more than five years. . . .

STATEMENT

Petitioner Richard Alvarez was charged in an indictment as follows: Count One, a violation of 18 U.S.C. § 371, conspiracy; Count Three, a violation of 18 U.S.C. § 215(a), receipt of gift for loan; Count Four, a violation of 18 U.S.C. § 657, embezzlement; and Count Six, a violation of 18 U.S.C. § 1344(a)(2), bank fraud. A co-defendant was also charged.

Alvarez joined in motions to dismiss the conspiracy and receipt of gift counts. The court denied the initial motion to dismiss on September 10, 1990. An additional motion to dismiss following the original denial was filed and also denied by the District Court. A proposed defense jury instruction presenting the issue of the elements of the receipt of gift charge was denied by the court. On August 13, 1991, Alvarez was convicted of Counts One, Three and Six and acquitted of Count Four. Timely appeal followed.

In brief, the evidence at trial showed that Petitioner received monies from one John Novak around the time that Novak was receiving a loan from the bank which employed Mr. Alvarez. The defense contended that this money was for a prior personal

obligation owed by Novak to Alvarez, was not related to the loan transaction and was therefore not a violation of the law.

Petitioner, Richard Alvarez, was employed at Continental Mortgage of America ("CMA") as President during 1983 and 1984. [TR[1], 329] CMA was a mortgage brokerage operation which prepared loan packages for servicing by financial institutions, including its parent company Continental Savings of America ("CSA"), a savings and loan institution. [TR 329]

In 1972, Mr. Alvarez had started a small company called RA Development. He worked with Richard Sutton to acquire and develop residential property and to work with developers in joint ventures. [TR 1095] In 1981, John Novak contacted Mr. Alvarez to obtain Alvarez' assistance in arranging a buyout of the loan from Homestead Savings. [TR 600, 1097] They agreed that RA Development would earn a one percent fee if they could provide an $8.5 million loan to purchase Novak's loan from Homestead. [TR 601, 1099] Mr. Alvarez, along with Sutton, through various financial institutions and private lenders produced sufficient funds to rescue the project. [TR 793, 1102-1104] Because he had made the funding available, Alvarez believed that he was entitled to his one percent fee and made demand on Novak for payment. Novak contended that since the loan had not funded Alvarez was not entitled to the fee. [TR 605, 799]

At the time of his employment at CSA, Alvarez made known to his employers that he had funds that would become owing to him for work that was in progress, including the Novak obligation. [TR 359, 1112-1114] Whenever he was asked by others about the propriety of receiving money from Novak, he made reference to an employment agreement which he believed authorized him to collect these prior fees. [TR 916, 932, 968, 998, 1011, 1032]

While at CSA, Alvarez became involved in processing loans for two real estate projects of Novak's in the Northern Bay Area. Two loan application packages from Novak were presented to the loan committee of CSA who approved the loans in the summer and fall of 1984. The first loan involved a project called Quarry

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[1] "TR" refers to the Reporter's Transcript of the trial.

Meadows. That loan commitment from CSA was made on July 31, 1984. [TR 630] Prior to the closing on that loan, Novak paid a real estate agent $107,200. [TR 633] The agent then wrote a check to Mr. Alvarez for approximately $35,000. [TR 920] Alvarez endorsed that check over to Richard Sutton, who kept one-half of it as partial payment on the monies owed him by Novak for Sutton's work on the prior financing. [TR 1067]

The subsequent loan was for a larger project, Partridge Knolls. The initial part of the loan was for $3.7 million, with an eventual total of $8.5 million. Novak paid the agent $170,000 in late December 1984 before the loan funded. From that amount, the agent paid Alvarez $56,000 on January 2, 1985. [TR 924] Alvarez immediately paid Sutton the balance owed to Sutton from the prior Novak debt. [TR 1147] Alvarez stated that he did not receive any funds for processing the loan but that the monies were repayment on the prior debt. [TR 1154]

REASONS FOR GRANTING THE PETITION

This case presents several questions regarding the constitutionality and application of a statute which attempts to regulate the conduct of employees and officers of financial institutions. The statute criminalizing the receipt for a gift in relation to a loan under which Petitioner was convicted is deficient because it fails to define any intent required for a conviction. This statute was subsequently amended to include the requirement that the act be done "corruptly" and with the intent to be influenced or rewarded.[2] This court has not ruled on the constitutionality of the interpretation of the prior language that no specific intent is required.

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[2] The 1986 version of the statute reads as follows: Whoever . . . as an officer, director, employee, agent, or attorney of a financial institution, corruptly solicits or demands for the benefit of any person, or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such intitution . . . shall be fined . . . or imprisoned not more than 20 years. . . .

This case also involves two aspects of jury instructions which are likely to recur in many cases. Initially, the statute proscribes conduct "except as provided by law." In failing to instruct the jury that this was an element of the offense, the court improperly shifted the burden of proof. Numerous criminal statutes contain similar language and this court should provide guidance for the proper instructions in trials on these types of charges. Secondly, the jury was not instructed that the Petitioner himself needed guilty knowledge of the criminal nature of the gift. This omission compounded the constitutional error of not requiring a specific intent. If the statute on its face is constitutional, then lower courts must be directed in the proper jury instructions in order to assure that the statute is properly applied to a defendant.

Finally, the case presents an opportunity for this court to resolve the question of whether an indictment is deficient where it alleges a number of acts in one count over a period of time including a time when the acts were not covered by any criminal statute. While several courts have found that the trial court must take some action to limit the coverage of the charge to comport with the ex post facto clause, the trial court here failed to take any such measures. The opinion below held that there was no error because at least one of the acts was committed after the enactment of the statute. Yet, the jury returned only a general verdict so the conclusion that the jury relied on that act is improper.

I. THE 1984 VERSION OF 18 U.S.C. § 215 IS VAGUE AND OVERBROAD.

Prior to 1986, 18 U.S.C. § 215(a) prohibited anyone who was an officer, director, employee, agent or attorney of any financial institution, "except as provided by law," from receiving "anything of value .... in connection with any transaction or business of such financial institution." This statute did not contain any definition of criminal intent until the 1986 amendment which added the requirement that the act be done "corruptly" and with the intent to be influenced or rewarded.

The version of the law for which Petitioner was convicted is constitutionally vague and overbroad because it does not contain the intent requirement added to the 1986 enactment. When

Congress added the new language, it explicitly acknowledged that the prior version did not meet constitutional standards.

The legislative history of the 1986 amendment highlights the significant constitutional infirmities of the prior statute. House Report No. 99-335 states:

> Because section 215 does not require a corrupt or bad purpose, it reaches all kinds of otherwise legitimate and acceptable conduct. As one witness before the Subcommittee on Criminal Justice noted, section 215, if read literally, would prevent financial institutions from conducting day-to-day business. Subsection (a) punishes a financial institution official for simply seeking anything of value for another in connection with any business of that institution, without regard to the intent of the official. Thus, a financial institution official who has referred a customer of that institution to a correspondent bank, or to a stock broker or other professional for that matter, has committed a federal crime. . . .
>
> Examples of the legitimate and acceptable practices that section 215 makes criminal include—
>
> a bank's payment of interest on an employee's account (and acceptance of the interest by an employee);
>
> a bank's requiring a borrower who is contractually responsible for paying the bank's legal fees to pay them directly to the attorneys;
>
> a company's donation of free space to a credit union serving its employees or allowing its employees to work in the credit union as volunteers while on company time;
>
> a bank employee's acceptance of a promotional item given away at a business or trade show. . .
>
> (1985 U.S. Code Cong. and Admin. News, Legislative History P.L. 99-370, at 1784.)

In *Secretary of the State of Md. v. J.H. Munson,* 467 U.S. 947, 964-65, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) this court defined the concept of "substantial overbreadth". Munson held that where there is a core of easily identifiable and constitutionally proscribable conduct covered by the statute, a defendant must show that the statute as applied to him is unconstitutional. When

however, there is no core of easily identifiable proscribable conduct, the statute on its face is unconstitutional. *Ibid.*

As the congressional history to the 1986 amendments indicates, section 215 as it existed in 1984 prohibited a person from buying lunch for a bank official, if during lunch the business of the institution was discussed. 1985 U.S. Code Cong. and Ad. News at 1784. Moreover, section 215 as it existed in 1984 prevented a person from giving "anything of value" to a bank official. This phrase would cover advice or verbal assistance, and thus the First Amendment is clearly implicated by the terminology of section 215 before its amendment.

Recent decisions in the Fifth Circuit have upheld this statute against constitutional attacks on grounds of vagueness and overbreadth. *See, United States v. Wicker,* 933 F.2d 284 (5th Cir. 1991), *cert. denied,* 112 S.Ct. 419, 116 L.Ed.2d 439 (1991); *United States v. Kelley,* 973 F.2d 1145 (5th Cir. 1992), *United States v. Humble,* 714 F.Supp. 794 (E.D.La 1989). In each of these cases, the court held that the statute did not invade First Amendment areas so that the test was whether the conduct of the individual challenging the statute was itself protected. Each case determined that the conduct of the specific defendant was not protected and that the statute was constitutional as applied.

Accepting the instant case will allow this court to consider the impact of the cases from the Fifth Circuit and determine if they are correctly decided. Although seemingly conducting a proper balancing inquiry, the rulings in the Fifth Circuit never really balanced the permissible and impermissible applications of section 215. For example, the *Humble* court first looked at Congress' intent when it passed section 215 and determined that the scope of "bad" activity section 215 was intended to cover was greater than the scope of "good" activity it might improperly criminalize. *Humble*, 714 F.Supp. at 797. The intent of Congress is irrelevant to overbreadth because Congress could never be held to have "intended" to pass an overbroad statute. Unless some court has given effect to Congressional intent by limiting the application of a statute, the intent of Congress does not govern the issue whether the statute as passed substantially infringes upon legitimate activity. Second, whether a statute covers activity which in fact is more

legitimate than illegitimate would seemingly be an issue left first and foremost to the body which passed the legislation itself, *i.e.* Congress. With respect to section 215, the legislative history demonstrates that section 215 was amended in 1986 because Congress concluded that it covered "all kinds of otherwise legitimate and acceptable conduct." The House Report on the amendment states that "the Committee, therefore, concluded that Section 215 must be narrowed. The current law makes federal criminals out of innocent persons who are not engaged in culpable or wrongful conduct." U.S. Code Cong. and Admin. News, Legislative History P.L. 99-370, at 1786.

The Fifth Circuit courts compound their error by next concluding under *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1972) that, even if section 215 covered innocent activity, such improper applications of the law could be weeded out on a case-by-case basis. See, *Wicker*, 933 F.2d at 288; *Humble*, 714 F.Supp. at 797. This solution applies *only* when a statute does not cover a substantial amount of legitimate activity. *Broadrick*, 413 U.S. at 616-17. This remedy to the overbreadth of section 215 is not available where, as here, Congress has determined that a statute is so broad that it could conceivably prevent all financial institutions from conducting day-to-day business. Congress has determined that section 215 as previously written was overly broad, and thus is unconstitutional. In light of the clear and unequivocal determinations made by Congress prior to amending section 215 in 1986, it is appropriate for this court to accept this case and adopt the purpose of narrowing the statute indicated in the legislative history of the law in Congress.

When a statute potentially infringes on these constitutional rights, a statute must

> "... define the criminal offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Kolender v. Lawson, 461 U.S. 352, 359, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

The Department of Justice opposed any amendments to section 215, arguing that the Department's Manual regulated the arbitrary enforcement of the statute. This claim was rejected by Congress, which noted in the House Report:

> More fundamentally, the Justice Department approach of relying upon the discretion of federal prosecutors leaves open the possibility of vindictive prosecution and does nothing to prevent innocent people who are not engaged in culpable or wrongful conduct from being stigmatized as criminals. 1985 U.S. Code Cong and Admin News, supra., at 1786.

Again, if Congress has concluded that section 215 allowed for totally arbitrary enforcement, a court should not secondguess that determination. Yet, the decision below and those of the Fifth Circuit have ignored the clear intent of Congress. Thus, the statute under which petitioner was convicted is both overbroad and vague. The implications go beyond this immediate statute as there are a number of similarly worded statutes which courts have interpreted to require a specific intent component even though that language has not been written directly into the law. (*See, e.g., Liparota v. United States,* 471 US 419, 105 S.Ct 2084, 85 L.Ed.2d 1482 (1985) [7 U.S.C. § 2024(b)(1)] and *United States v. Aguon,* 851 F.2d 1158 (9th Cir. 1988) (en banc), *overruled on other grounds, Evans v. United States,* 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992) [18 U.S.C. § 1951]; cf. *United States v. Brewster,* 506 F.2d 62 (D.C. Cir. 1974) [18 U.S.C. § 201]. Review by this court will harmonize the law on the interpretation of these statutes.

II. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY SHIFTING THE BURDEN OF PROOF TO THE PETITIONER.

The charge set forth in Count Three of the indictment never alleged that Petitioner received money in a manner not provided for by law. Insofar as such an allegation is a requisite element of 18 U.S.C. § 215, Count Three is inadequate.

The fact that the Government must allege and prove that the defendant made a payment to a bank official in relation to a bank transaction "except as provided by law" is self-evident. If the

Government did not have to prove that a payment to a bank official was not authorized by law, every loan payment, check charge, points payment, or credit card yearly fee would be subject to prosecution. The only thing which would prevent the Government from being empowered to charge everyone dealing with a bank under 18 U.S.C. § 215 is the statutory restriction that only those payments not otherwise authorized by law are subject to prosecution. It is this statutory restriction which the Government failed to allege in this indictment and prove at trial.

This court has held consistently that the Government must prove every element of the charged offense beyond a reasonable doubt. *Carella v. California,* 491 U.S. 263, 109 S.Ct 2419, 105 L.Ed.2d 218 (1989). Jury instructions that shift this burden of proof to the defendant are unconstitutional. The question presented by section 215 is whether the language "except as provided by law" is an essential element of the offense or an affirmative defense. Two circuits in interpreting an analogous statute have found similar language to be an element of the offense.

In *United States v. Brewster, supra,* 506 F.2d 62, the Court examined the intent requirements of 18 U.S.C. § 201 and the necessary elements of its various subdivisions. Although the issue in *Brewster* was whether section 201(g) (the "gratuity" section) was a lesser included offense of section 201(c) (the "bribery" section), the court nonetheless set forth its interpretation of the intent element of each subsection:

> As to the requisite criminal intent, the bribery section (c) calls for the thing of value to be received "corruptly," while the gratuity section (g) merely refers to the acceptance or receipt of a thing of value *"otherwise than as provided by law for the proper discharge of official duty."*

Brewster, 506 F.2d at 68 (emphasis added).

The court later addressed the appellant's argument that because there was apparently no criminal intent element of section 210(g), the statute was unconstitutionally vague. The court rejected this claim by ruling:

> It is here in his argument that the defendant seeks to profit by confusing (1) the absence in the gratuity section of the bribery section's requirement of an intent "corruptly" to accept funds, with (2) the absence of any criminal intent at all in the gratuity section. To the contrary, the gratuity section *does* require a criminal intent, expressed by the language "otherwise than as provided by law for the proper discharge of official duty . . . for or because of any official act performed or to be performed by him."

Brewster, 506 F.2d at 76.

This ruling in *Brewster* is consistent with at least one other circuit's interpretation of the intent requirement of section 201(g). *United States v. Evans,* 572 F.2d 455, 480 (5th Cir. 1978). As the *Evans* Court ruled,

> The requisite intent necessary to sustain a conviction for bribery is that the official accept a thing of value "corruptly." However, under the unlawful gratuity subsection all that need be proven is that the official accepted, because of his position, a thing of value *"otherwise than as provided by law for the proper discharge of official duty."*

Id. at 480 (emphasis added).

If the constitutionality of the statute is saved by the language "otherwise than as provided by law," this limitation must be an element of the offense which must be proven by the Government beyond a reasonable doubt. To place the burden on the defendant to prove at trial that a given payment was made in accordance with the law would improperly shift the burden to the defendant.

The instant matter presents an excellent vehicle for establishing guidelines for which party has the burden of proof on this element which is set out in several federal criminal statutes.

III. THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT PETITIONER'S KNOWLEDGE OF THE IMPROPRIETY OF THE ACT WAS REQUIRED FOR CONVICTION.

The opinion of the court below is in direct conflict with another Ninth Circuit decision and this court should accept certiorari to resolve the conflict. The trial court instructed the jury in relevant part that it must find that the money was paid for and in connection with a loan. Since the jury was never instructed that petitioner had to have a corrupt intent, it was possible for the jury to have convicted petitioner if the person who paid the money believed it was for the loan while petitioner himself believed that the payment was merely for the prior debt and was therefore not connected to the loan.

The importance of this ambiguity is critical to the lack of mens rea under the statute in its prior form. Not only must the government prove a wrongful deed, it must also prove a guilty mind. Thus, in *United States v. Aguon, supra,* the Ninth Circuit en banc held that it was plain error for a jury instruction to permit an extortion conviction on a finding that a defendant simply received money to which she was not entitled without any criminal intent. The Hobbs Act statute under which Aguon was convicted did not contain specific language setting out the required criminal intent. (*See,* 18 U.S.C. § 1951) The loan kickback statute, as the Hobbs Act, did not state on its face the requisite criminal intent. Similarly, under the instruction here, Petitioner could be convicted simply for receiving the money without any criminal intent on his part. This court should accept this matter to determine the required jury instruction for statutes which include language similar to the version of 18 U.S.C. § 215 under which petitioner was convicted.

IV. CONVICTIONS IN COUNTS ONE AND SIX ARE BARRED BY THE EX POST FACTO CLAUSE.

Acceptance of this case will permit this court to establish a clear guideline for the application of the ex post facto doctrine for crimes which are alleged to have occurred over a period of time part of which involved dates when the acts were not illegal. This is

a recurring issue in light of the conspiracy laws and the many new criminal statutes which are constantly being added by Congress.

In both Counts One and Six, Appellant was charged with allegations which began at an "unknown time" and continued into 1985. The conspiracy in Count One included alleged overt acts which were committed on dates prior to October 12, 1984 in addition to covering a period beginning at an unknown time.

Effective October 12, 1984, Congress made several changes to the laws criminalizing acts involving banks and saving and loan institutions. Congress enacted 18 U.S.C. § 1344 to counter bank fraud and amended 18 U.S.C. § 215 to cover financial institutions insured by FSLIC which had not been previously covered.

Petitioner's acts occurring before October 12, 1984 were not illegal and his convictions are barred by the Ex Post Facto clause, U.S. Const. art. I, § 9, cl. 3. By failing to limit the allegations in the indictment to cover the period of time when the acts were covered by the statutes, by striking language in the indictment or by properly instructing the jury, the trial court erred.

At trial, the Government produced evidence that the "scheme" was established well before October 12, 1984. Because the jury entered only a general verdict, there is no way to determine if there was a unanimous factual determination that the act or acts which formed the basis of the verdicts occurred within the proper time period. Thus, the jury could have agreed that the acts before the relevant date constituted guilt of the charge without the necessity of making any reference to the acts alleged after the enactment of the statute.

Two court opinions have examined the problem of acts occurring before the enactment of these statutes. In *United States v. Wicker,* 933 F.2d at 288-289, the trial court corrected this defect in the indictment by striking all reference to acts prior to the effective date of the law. The appellate court was thus not faced with the impact on the verdicts should the prior acts have remained in the indictment, and it implicitly approved the trial court's striking of the offending language.

Similarly, the district court in *United States v. Whitty,* 688 F.Supp. 48 (D.Me 1988) ruled that an indictment which charged acts before and after the effective date need not result in outright dismissal of the indictment; however, the court noted that at trial the Government would be required to show that the bank fraud scheme was executed after the effective date of the statute. *Id.* at 53-54.

The trial court here made no attempt to limit, through jury instructions or through the receipt of evidence, the consideration by the jury of the charges to the time period after October 12, 1984. Both in the conspiracy count and in the bank fraud count, the jury was given unrestricted freedom to find that any of the alleged acts of Petitioner comprised a violation of the law. The prosecutor, in the presentation of the evidence and in his argument to the jury, made no distinction between the acts based on the date they were committed.

In an analogous situation of the application of the RICO statute to acts occurring before its enactment, two courts have required that the charges be limited through proper jury instructions. *See, United States v. Boffa,* 688 F.2d 919 (3rd Cir. 1982), *cert. denied,* 460 U.S. 1022, 103 S.Ct. 1272, 75 L.Ed.2d 494 (1983) [affirming the practice of limiting instructions to require a verdict on the acts after enactment of the statute] and *United States v. Brown,* 555 F.2d 407 (5th Cir. 1977), *cert. denied,* 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978) [reversing count where instructions did not limit jury consideration to acts after the enactment of the statute]. The trial court here erred by failing to provide such limiting instructions to the jury.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this court grant certiorari and reverse his convictions.

Dated: December 2, 1993

Respectfully submitted,

ANDREW PARNES
Counsel for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD ALVAREZ,

Defendant-Appellant.

No. 92-10009
D.C.
No. CR-89-00686-DLJ
MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California D. Lowell Jensen,
District Judge, Presiding

Argued and Submitted May 10, 1993
San Francisco, California

Before: POOLE, BOOCHEVER and FERNANDEZ, Circuit Judges

Richard Alvarez appeals his convictions for conspiracy, receipt of gifts for procuring loans, 18 U.S.C. § 215(a),[1] and bank fraud, 18 U.S.C. § 1344, arising from his participation in obtaining loans from his employer for codefendant John Novak. We affirm.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[1]References to § 215 are to the version of 18 U.S.C. § 215 effective October 12, 1984. Continuing Appropriations, 1985 — Comprehensive Crime Control Act of 1984, Publ. L. No. 473, Title II, § 1107, 98 Stat. 2145-46 (1984).

DISCUSSION

A. *Constitutional Challenges.*

Section 215(a) of the Bank Bribery Act makes it a crime for a bank officer to directly or indirectly receive "anything of value, for himself . . . for or in connection with any transaction or business of such financial institution." Alvarez contends that § 215 is unconstitutionally overbroad and vague.

1. *Overbreadth.*

In a facial overbreadth challenge, the court must first determine whether the law "reaches a substantial amount of constitutionally protected conduct," *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S. Ct. 1186, 1191, 71 L. Ed. 2d 362 (1982) (*Flipside*). A statute is not overbroad simply because there is a possibility that it reaches legitimate conduct. When the statute covers speech and conduct, the overbreadth must be real and substantial, compared to the statute's legitimate sweep. *United States v. Stansell*, 847 F.2d 609, 613, 615 (9th Cir. 1988).

Section 215 does not infringe First Amendment rights. It does not prohibit political, social or symbolic speech, and the overbreadth doctrine does not apply to commercial speech. *See Flipside*, 455 U.S. at 496-97, 102 S. Ct. at 1192; *United States v. Austin*, 902 F.2d 743, 744-45 (9th Cir.), *cert. denied*, 498 U.S. 874, 111 S. Ct. 200, 112 L. Ed. 2d 161 (1990); *United States v. Hutson*, 843 F.2d 1232, 1235 (9th Cir. 1988). The section does not prohibit speech, except that of asking or demanding personal payment in connection with a bank transaction. That is no more deserving of protection than an extortionate threat. *See Hutson*. 843 F.2d at 1235.

Section 215 does not criminalize substantial legitimate conduct. Although the statute conceivably reaches some innocent conduct, the threat of prosecution for that conduct is insignificant. *United States v. Wicker*, 933 F.2d 284, 287-88 (5th Cir.), *cert. denied*, 112 S. Ct. 419, 116 L. Ed. 2d 439 (1991); *see United States v. Humble*, 714 F. Supp. 794, 795-97 (E.D. La. 1989). In

any event, the statute is not overbroad as applied to Alvarez. The jury found that Alvarez received money in exchange for his assistance in obtaining loans. This is precisely the type of conduct that lies at the heart of the activities § 215 was enacted to prohibt. *See Ryan v. United States*, 278 F.2d 836, 838 (9th Cir. 1960) (applying pre-1984 version of § 215).

2. *Vagueness.*

Because the First Amendment is not involved, Alvarez may only challenge § 215 as applied to his conduct. *See, e.g., Flipside*, 455 U.S. at 497-504, 102 S. Ct. at 1193-96. A statute is impermissibly vague if it fails to sufficiently define the offense so that an ordinary person can understand what is prohibited, and it provides no standards for enforcement. *See, e.g., Wicker*, 933 F.2d at 288.

Alvarez says that he believed that his conduct was not covered by § 215 because he thought he was getting paid for a prior debt. But the statute is not judged by Alvarez's version of the facts. The jury found that Alvarez received money "for or in connection with" the Novak loans from CSA. Certainly any ordinary person could plainly see that the statute was designed to prohibit kickback schemes of the type Alvarez was said to have engaged in, and the statute does not truly lend itself to discriminatory enforcement. *See, e.g., Stansell*, 847 F.2d at 615-16; *United States v. Kelly*, 973 F.2d 1145, 1152 (5th Cir. 1992); *Wicker*, 933 F.2d at 288; *Humble*, 714 F. Supp. at 797-98.

B. *Elements of Section 215 Offense.*

Alvarez claims that the "except as provided by law" clause in § 215 means that the government must plead and prove, as an element of the offense, that the payment received by Alvarez was not authorized by law. The government contends that it refers to an affirmative defense. We agree with the government.

It is the general rule that an indictment " 'need not negative the matter of an exception made by a proviso or other distinct clause . . .' " *United States v. Hester*, 719 F.2d 1041, 1042 (9th Cir. 1983) (citation omitted).

United States v. Evans, 572 F.2d 455, 480-82 (5th Cir.), *cert. denied*, 439 U.S. 870, 99 S. Ct. 200, 58 L. Ed. 2d 182 (1978), and *United States v. Brewster*, 506 F.2d 62, 68, 71-72, 82 (D.C. Cir. 1974), which construed proviso language in a prior version of the illegal gratuity statute, are not to the contrary. Neither decision places on the government the burden of pleading or proving that the gratuity was not authorized by law. In each case, it was sufficient for the government to prove that money was accepted with knowledge that it was given for the purpose proscribed in the statute, *i.e.*, for an official act or because of the official's position. *Evans*, 572 F.2d at 482; *Brewster*, 506 F.2d at 82; *see United States v. Campbell*, 684 F.2d 141, 149-50 (D.C. Cir. 1982).

Moreover, it makes sense to place the burden of producing evidence on the defendant. The class of payments that an institution's officer can receive for and in connection with a loan is exceedingly small to say the least. With the exception of salary payments, *see* U.S.C. § 215(d), an officer is generally prohibited from receiving "any fee or other compensation of any kind in connection with the procurement of any loan from such institution." 12 C.F.R. § 563.40(a) (1984). If a defendant believes he has found some unique or arcane exception to the general rule, it is "far more manageable for the defendant to shoulder the burden of producing evidence" to that effect. *Hester*, 719 F.2d at 1043. In short, it was sufficient for the government to plead that Alvarez received the payment with knowledge of the proscribed purpose — that the payment was for or in connection with the loans. The district court did not err in refusing to dismiss the indictment for failing to allege that the payment was not authorized by law.

C. *Ex Post Facto.*

The indictment charged Alvarez with execution of a scheme to commit bank fraud, commencing from an unknown date until January 8, 1985, and with conspiracy to commit bank fraud, embezzlement and receipt of gifts for procuring loans, commencing from an unknown date until August 26, 1985. The bank fraud statute, 18 U.S.C. § 1344, was enacted on October 12, 1984. Alvarez contends that because the jury could have convicted him of bank fraud and conspiracy to commit bank fraud based on acts

committed prior to October 12, 1984, the convictions violate the ex post facto clause. U.S. Const. art. I, § 9, cl. 3.

Alvarez failed to raise this issue below and has waived any error on this ground. *See United States v. Calabrese*, 825 F.2d 1342, 1346 (9th Cir. 1987). The verdict constitutes a finding that the bank fraud scheme was executed up until January 8, 1985. *See id.* Although one loan closed prior to October 1984, the other commitment was not issued until November 1984. Thus, there were some acts committed after the enactment of § 1344. Alvarez's convictions of bank fraud and conspiracy do not violate the ex post facto clause.

D. *Evidence of Prior Conduct.*

The government introduced portions of Alvarez's deposition testimony from a civil lawsuit, in which Alvarez disclosed that while working for Homestead Savings he was involved in maintaining two sets of loan documentation. One set was for review by bank regulators; the other evidenced the true substance of the transactions — 100% financing for real estate developments, which violated banking regulations. Alvarez did not object.

Alvarez's knowledge of the false vouchers and the return of Novak's downpayment was a disputed issue. The Homestead transactions were similar in form and substance to the CSA transaction Alvarez put together for Novak. Alvarez's previous deposition testimony tended to show Alvarez's intent to defraud CSA, an element of the bank fraud count, and to show knowledge, preparation, and absence of mistake or accident. *See* Fed. R. Evid. 404(b); *United States v. Faust*, 850 F.2d 575, 583-85 (9th Cir. 1988); *United States v. Jenkins*, 785 F.2d 1387, 1395-96 (9th Cir.), *cert. denied*, 479 U.S. 855, 107 S. Ct. 192, 93 L. Ed. 2d 125 (1986). The admission of this evidence was not plain error. *See United States v. Segal*, 852 F.2d 1152, 1155 (9th Cir. 1988).

E. *Jury Instructions.*

1. *The Section 215 Offense.*

Alvarez did not object to the form of the instruction on the § 215 offense. As discussed in Section B, *supra*, the government need not plead and prove that the payment Alvarez received was not authorized by law. Rather, Alvarez was required to raise the issue as a defense. He did not. The jury instruction was proper as to this element.

The instruction is somewhat ambiguous with respect to the element of intent. The government must prove a guilty mind as well as a wrongful deed. *United States v. Aguon*, 851 F.2d 1158, 1168-69 (9th Cir. 1988) (en banc) (plain error in jury instructions which permitted extortion conviction based on finding that defendant simply received money to which she was not entitled), *overruled on other grounds*, *Evans v. United States*, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992); *cf. United States v. Egan*, 860 F.2d 904, 908-09 (9th Cir. 1988) (no plain error when jury instructed that it must find defendant caused people to give him money by threatening to take or withhold official action, since such finding must include mens rea).

In this case, the jury was instructed that it could convict if it found that Alvarez knowingly received money and that "such payment was for and in connection [with] a transaction or business of [CSA]." The instruction is ambiguous because it does not clearly state who must know that the payment was in connection with CSA loans. Alvarez admitted receiving money from Novak; his defense was that he did not know that the payment was for the CSA loans, *i.e.*, he had no guilty knowledge. Considered in a vacuum one can argue that the jury could have convicted Alvarez if it found that Novak knew the payment was for the CSA loans, but that Alvarez understood that the payment was for a prior debt.

Nevertheless, it is clear from the presentation of the case and the closing arguments that the jury was asked to determine whether Alvarez knew that the money was a kickback for obtaining the CSA loans for Novak. Thus, it is highly unlikely that the error affected Alvarez's substantial rights and "had an unfair

prejudicial impact on the jury's deliberations." *United States v. Hoac*, No. 91-50193, slip op. 2809, 2828-29 (9th Cir. Mar. 26, 1993) (citation and internal quotation omitted).

2. *Good Faith.*

Alvarez did not object to the failure to give his requested good faith defense instruction. He therefore failed to preserve his claim of error.

Insofar as it relates to the bank fraud count, the failure to give a good faith instruction was not error. A defendant is not entitled to a good faith instruction when the court adequately instructs on specific intent. *See, e.g., United States v. Rushton*, 963 F.2d 272, 274 (9th Cir. 1992); *United States v. Gering*, 716 F.2d 615, 622 (9th Cir. 1983).

With respect to the § 215 count, it must be acknowledged that the district court's failure to instruct on good faith overlooked an opportunity to clear up any ambiguity regarding intent. *See United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990). However, based on the posture of the case as it was sent to the jury, it is highly unlikely that the failure to give the good faith instruction "so affected the jury's ability to consider the totality of the evidence fairly that it tainted the verdict and deprived [Alvarez] of a fair trial." *Hoac*, slip op. at 2828 (citation and internal quotation omitted).

3. *Character.*

The district court refused Alvarez's requested instruction on his good character for truthfulness and honesty on the ground that there was no evidentiary basis for it. The district court's stated reason was incorrect because there was some testimony about Alvarez's character. However, the requested instruction was not a theory of the defense instruction and, given its general nature, it was adequately covered in other parts of the charge. Also, the court said that Alvarez could argue the issue to the jury — he chose not to do so. It may have been better if the court had given the instruction, but the failure to do so was harmless error at most.

F. *Ineffective Assistance of Counsel.*

Alvarez claims that defense counsel rendered ineffective assistance by allegedly conceding his guilt to the jury in closing argument. The import of the three sentences to which Alvarez objects is not entirely clear, but it is most probable that counsel's point was that if the jury found a kickback, it must convict. A different interpretation would make the statements inconsistent with the remainder of counsel's argument. Certainly they do not rise to the level of abandonment of a client which warranted reversal in *United States v. Swanson*, 943 F.2d 1070, 1072 (9th Cir. 1991). Nor has Alvarez demonstrated that the objectionable sentences constituted deficient performance, or that he was prejudiced. *See id.* (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

G. *Prosecutorial Misconduct.*

Finally, the prosecutor's comment in closing argument, that Alvarez's conduct could have destroyed the bank, was based on evidence. Thus, while the actual effect on the institution is beside the point, the comment does not constitute plain error and does not warrant reversal of the conviction. *See United States v. Molina*, 934 F.2d 1440, 1444 (9th Cir. 1991).

AFFIRMED.